in the street, in strict subordinance to the rights of the traveling public it would seem to follow that if the ordinances themselves were reasonable exercises of the police power then the placing of the meters would be a reasonable means of effectuating the objects sought. Reference may be made to markers of state or national highway systems,[33] or even purely ornamental pieces.[34] It is doubtful whether the Alabama Court would disagree with this reasoning although its reference to the right of the owner not "* * * to have his property defaced by superimposed obstructions, barriers, or parking meters placed alongside" encouraged the mention herein made.[35]

PHILIP J. WOLF

RIGHT OF PRIVATE ELECTRIC UTILITY TO ATTACK THE CONSTITUTIONALITY OF A GRANT OF FUNDS TO A LOCAL SUBDIVISION TO BE USED TO CONSTRUCT A COMPETING POWER PLANT

The Alabama Power Company brought suit against Harold L. Ickes, as Federal Emergency Administrator of Public Works, to enjoin the loan and grant of federal funds to a municipality to be used for the erection of an electric plant which would operate in competition with petitioner's electric system. The Supreme Court, in affirming decisions of the Circuit Court of Appeals of the District of Columbia and the District Court, held that the loss to the petitioner was the result of lawful competition by the municipality and as such, *damnum absque injuria* giving petitioner no standing in court to contest the constitutionality of the loan and grant. *Alabama Power Company* v. *Harold L. Ickes, etc. et. al.*, 301 U.S. 681, 82 L. Ed. 263 (1938), U.S. Law Week., Jan. 4, 1938, p. 3, affirming 91 Fed. (2d) 303 (1937).

The important question raised by this decision may be simply stated. When A is injured by the lawful acts of B does A have an action against C who was the instigator of B's acts? Several different situations are possible.

First: If C's action in inducing B to act is lawful and unaccompanied with an intention to injure A, it is apparent that A would have no recourse against C. The owner of a grocery would have no legal rights against the bank that loaned money to his competitor whereby he was forced out of business. Second: Where C's action is intended to

[33] *Scars* v. *Hopley*, 103 Ohio St. 46, 132 N.E. 25, 16 A.L.R. 925 (1921).
[34] *Thomkins* v. *Hodgson*, 2 Hun. (N.Y.) 146 (1874).
[35] *Supra*, note 3.

injure A but the act done to induce B to act is lawful there is respectable authority to the effect that A has an action against C. *Hutton* v. *Walters*, 132 Tenn. 527, 179 S.W. 134 (1915); *London Guarantee Co.* v. *Horn*, 206 Ill. 493, 69 N.E. 526 (1904). Third: Where C is not animated by an intention to harm A but there is illegality in his inducing B to act, it is generally held that A cannot question the legality of C's action. Thus in *Railroad Company* v. *Ellerman*, 105 U.S. 166, 26 L. ed. 1015 (1882) the owner of a private wharf was held to have no standing in court to question the legality of an *ultra vires* lease of wharves owned by the defendant railroad that were to be used by the lessee in competition with the plaintiff. Fourth: Where C's action is both unlawful and impelled by a desire to injure A it seems clear that A should be able to hold C for the damage done him despite the interposition of an intermediary whose otherwise lawful acts are the immediate cause of A's damage. Several Supreme Court cases support this proposition. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070 (1925) the owner of a private school was held to have a standing in court to urge the unconstitutionality of an Oregon statute which compelled parents to send their children to public schools despite the fact that the plaintiff had no legal action against the parents themselves for withdrawing their children. As was stated by the court, "* * * no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their person and property. Their interest is clear and immediate * * *." In *Hammer* v. *Dagenhart*, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918) the employer had a clear legal right to discharge plaintiff's minor son and yet the plaintiff was permitted to attack the constitutionality of a federal act that would have forced the employer to discharge the minor. To the same effect see *Truax* v. *Raich*, 239 U.S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131 (1915).

Into which of these four categories can the instant case be inserted? Despite the mass of evidence to the contrary presented by the petitioner the court accepted as conclusive a finding of fact by the district court that: "There was and is no consipiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or

electric rates generally, or to foster municipal ownership of public utilities." If we assume for the purpose of discussion, as did the court, that the loan and grant in question was an unconstitutional exercise of federal power, we have clearly the number three situation and the decision denying the Alabama Power Company the right to contest the constitutionality of the loan and grant cannot be questioned.

Properly construed this decision does not place judicial sanction upon a new means whereby the federal government can attain what has heretofore been considered unconstitutional ends. Its circumvention is but a matter of adducing sufficient proof to show the existence of an intention on the part of the federal agency making the grant or loan to accomplish an unconstitutional objective thus bringing the case within the number four situation discussed above. Accordingly if the loan or grant was made under an enabling act which showed on its face an intention to regulate utility rates there should be no question but that the person specially injured thereby could enjoin the unlawful grant. To hold otherwise would be to concede to the federal government the power to control all commodity prices by the utilization of lawful competition financed by unlawful federal appropriations.

It may be objected that *Pierce* v. *Society of Sisters, supra; Hammer* v. *Dagenhart, supra;* and *Truax* v. *Raich, supra* discussed above are dissimilar to the instance case even with the addition of a proven intent on the part of Congress to accomplish an unconstitutional end in that the formed involved statutes that *forced* the person whose acts would otherwise be rightful to act to the damage of the plaintiffs while in the latter the government is merely inducing what would otherwise be lawful competition. It is submitted that this distinction is more apparent than real. In *Chas. G. Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 57 Sup. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293 (1937) it was implied that the federal government can gain the cooperation of a governmental subdivision by a rebate of funds collected by taxation only when the acts demanded of the subdivision as a condition of the grant were related to "* * * activities fairly within the scope of national policy and power * * *." This view seems consonant with reason. If congress achieves ends that are unconstitutional should it matter if those ends are gained through coercion or inducement?

GEORGE E. BAILEY